IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1234

UNITED CAPITOL INSURANCE COMPANY,
Petitioner,

v.

NICHOLS & ASSOCIATES TRYON PROPERTIES, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

Respondents have unnecessarily complicated a very narrow question of bankruptcy court jurisdiction by dwelling upon the irrelevant and the obvious.

As to the irrelevant: Respondents devote the first half of their Brief in Opposition to a debate of contested facts that go to the merits of the underlying case but have nothing to do with the question presented to this Court.[1]

[1] Respondents' prolonged discussion of the facts of the underlying dispute is predicated on the erroneous assertion that Petitioner's Statement of the Case contains "factual misstatements." (Brief in

This Court is not asked to decide the underlying insurance coverage issue; for purposes of the question presented to this Court, it is completely irrelevant whether Nichols did or did not start the fire that caused the loss. Similarly, this Court is not asked to review the discovery dispute. The only question before this Court is whether the Article I bankruptcy court, lacking the express consent of the parties, has jurisdiction to render final orders on those issues.

As to the obvious: It is not disputed that United Capitol acquiesced in the bankruptcy court's supervision of pretrial discovery proceedings. Nor is it disputed that United Capitol failed to object to the jurisdiction of the bankruptcy court until it became aware of its constitutional right to have the state law breach of contract claim adjudicated by an Article III court.[2] Respondents have tried to reframe the question presented to focus on whether those facts are sufficient to constitute implied consent. However, the question presented to this Court is not whether United Capitol impliedly consented to the exercise of jurisdiction by the bankruptcy court, but whether implied consent is sufficient.

Respondents never address the question presented. They do, however, raise two "red herring" issues that warrant brief reply to avoid confusion.

Opposition at 2, n.1.) Petitioner's Statement of the Case is excerpted in all material respects from the opinion of the court of appeals. (Petition app. at 2a-4a.) The statement specifically challenged by Respondents (Brief in Opposition at 3) that the bankruptcy court "lifted the automatic stay to allow the sale of the Tryon Mall," tracks the language of the court of appeals' opinion. (Petition app. at 3a.)

[2] This is not a case in which a party knew of its rights and failed to assert them in a timely manner in order to gain some strategic advantage or the proverbial "second bite at the apple." Rather, United Capitol raised the jurisdictional defect immediately upon discovery and, as pointed out in the Petition at p. 5, n.1, the issue of subject matter jurisdiction can be raised at any time.

I. THERE IS A DIRECT SPLIT IN THE CIRCUITS ON THE ISSUE PRESENTED

Respondents state that: "All circuits—despite United Capitol's claims of a conflict—acknowledge bankruptcy courts may enter final orders even in 'non-core' proceedings when the parties consent." (Brief in Opposition at 11.) United Capitol did not assert that a conflict exists among the circuits on that issue, which was clearly decided by this Court in *Northern Pipeline Constr. Co. v. Marathon Pipe Line*, 458 U.S. 50 (1982). The conflict among the circuits is on the narrower question of whether the consent must be express (as held by the Seventh and Eleventh Circuits) or whether it may be implied (as held by the Second, Fourth, Eighth, and Ninth Circuits).

Respondents erroneously assert that an unpublished opinion cannot be relied upon for creating a split of authority among the circuits. In *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 34 (1975), this Court granted review of an unpublished decision of the court of appeals for the Seventh Circuit, which relied upon an earlier published opinion of the Seventh Circuit. Similarly, the court of appeals in this case expressly relied upon its earlier published opinion in *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396 (4th Cir. 1992), holding that "a party can impliedly consent to entry of judgment by the bankruptcy court in a non-core related matter." (Petition app. at 7a, quoting *In re Johnson* at 403.)

Moreover, the clear split among the circuits is not dependent solely upon the Fourth Circuit's decision in this case. The Second, Eighth and Ninth Circuits have reached the same result as the Fourth Circuit in holding that consent may be implied; whereas, both the Seventh and Eleventh Circuits hold that only express consent will suffice. (Petition at 12-17.)

II. THIS COURT HAS PLENARY JURISDICTION TO ISSUE THE WRIT OF CERTIORARI

Respondents apparently have confused this Court's plenary jurisdiction (which allows it to issue the Writ of Certiorari and review this case) with this Court's discretionary review authority (which allows it to deny the Petition). The question presented to this Court is one of subject matter jurisdiction. The jurisdictional issue was properly raised in and considered by the court of appeals; the decision of the court of appeals is subject to review by this Court, should this Court choose to issue the Writ of Certiorari. *See* 28 U.S.C. § 1254(1).

The single case relied upon by the Respondents to preclude review by this Court is totally inapplicable to the issue presented in the Petition. *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), stands for the proposition that courts should not render advisory opinions on the merits of administrative agency orders when such orders are subject to discretionary and unreviewable modification by the President. In contrast to the administrative order considered in *Waterman*, the jurisdictional issue presented in this case is not subject to further review or modification, except by this Court.[3]

Finally on the subject of discretionary review, Respondents contend (without filing a cross-petition) that the complex core/non-core issue "would necessarily need to be determined" by this Court if the Petition were granted on the narrow issue presented. (Brief in Opposition at 18.) United Capitol believes that the court of appeals correctly decided that the underlying adversary proceeding was non-core and, as Respondents acknowledge, that the court of appeals' decision on that point raises no issue of significance warranting review by this Court. Although

[3] Although the court of appeals remanded the case for further consideration of the underlying issues, the actions of the bankruptcy court on remand will not change the jurisdictional question presented to this Court.

this Court may include the core/non-core issue in its grant of certiorari, it certainly is not required to do so. This Court, of course, may limit its grant of certiorari to the narrow issue presented in the Petition. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* § 5.10 (6th ed. 1986).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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